From: Ken Wallentine
To: Kutches, Brandon (SHF)
Subject: Xiphos: March 2019 - Timely Legal Analysis from Lexipol
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Xiphos (KSEE-fohss): a double-edged, one-handed sword used by ancient Greeks.

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March 2019

In this issue of *Xiphos*, we're reminded officer conduct can make a difference in the outcome of a lawsuit - one case reviews the determination of lawful detention and several others involve the application of the qualified immunity doctrine. We're also reviewing the foregone conclusion doctrine as it relates to the various biometric features used to unlock cell phones and the array of digital evidence they may contain.

Speaking of cell phones, this time of year I enjoy being unplugged. Spring has officially arrived and that means lots of road miles await the Road Glide. As always, if you have an idea for a great motorcycle ride in your area, let me know. Remember, shiny side up, rubber side down. Happy riding!

— *Ken*

In Memory of Deputy Terry Fleck

If you're a cop in the United States and had any police service dog interaction, your life was likely touched by Deputy (Dr.) Terry Fleck. He passed away March 26, still in the prime of his rich and wonderful life. I met Terry

Fleck many years ago, when he was already an excellent K9 handler and trainer. Our mutual drive to improve policing was the foundation of a great friendship and professional collaboration. Terry Fleck was first and foremost a cop who worked unceasingly to help other cops do their jobs better.

Today, right now, stop and do three things. First, either by phone or touch, reach out to your life partner and express your love. Don't wait. Give them a hug. Never wait to express love to someone who matters to you. Second, remind the cops around you that you are committed to one another and you have their six at all times and in all things noble and good. Third, remember Terry Fleck by a trip to K9Fleck.org. It is the broadest and deepest repository of accessible information about service dogs. The reason that my *K9 Handler's Legal Handbook* is dedicated to Terry Fleck is his constant pattern of having ready answers and quickly responding to anyone who needed his help. I hope you are that kind of cop.

I will miss Terry as a friend, brother in arms, consulting partner and teaching colleague. He found trouble before trouble found the people he served. He confronted evil head on and fought the good fight.

Asking Nicely–Not Ordering–Makes a Difference

An officer saw Eric Tanguay and a woman parked in a strip mall parking lot just after midnight. The officer passed through the area 20 minutes later and saw they hadn't moved. He approached the car, saw Tanguay and the woman were eating food from a nearby Taco Bell, and asked for their names. When Tanguay identified himself, the officer recognized his name as one associated with drug trafficking.

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Death from a Rolling Block Maneuver

Austin Moon was riding his motorcycle on the interstate, speeding at triple-digit speeds, and weaving in and out of traffic. An officer in a marked police vehicle activated emergency lights to stop Moon, but Moon hit the throttle and sped out of the officer's sight. The officer broadcast his attempted stop and notified area officers Moon had fled on his motorcycle.

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Flexing Her Finger Was Just Flexing Her Rights

An officer stopped Debra Cruise-Gulyas for a speeding violation, but kindly opted to issue her a warning and a non-moving violation citation, rather than a speeding citation. To show her thanks, Cruise-Gulyas flexed her middle finger upward in “an all-too-familiar gesture.” Indeed, the raised middle finger has been an expression of sexual vulgarity for more than 2,400 years. Aristophanes wrote a satirical play, *The Clouds*, in 423 B.C., in which Strepsiades raises his middle finger and shoves it directly in front of the venerable Socrates. Plato later claimed the offensive portrayal of Socrates in the play contributed to Socrates’ execution a quarter-century later.

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Fingerprints, Facial Recognition, Retinal Scans, Passcodes and the Fifth Amendment

Whether facing an investigation into human trafficking, drug distribution, criminal gang violence, or child sexual exploitation, investigators must come to grips with the Fourth and Fifth Amendment rules impacting access to digital evidence. Maybe once upon a time only financial fraud investigators needed to be well-versed in wire transfers and communications fraud, but today nearly every major crime has some association with digital evidence. Consider the tragic case of the New Zealand mosque mass murders, where the suspect live-streamed his killing spree and the preceding rants on social media —that’s critical digital evidence. Accessing that kind of digital evidence in the United States requires familiarity with emerging constitutional doctrines. As an illustration, consider the following cases.

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Is a Cell Phone a Tracking Device? More *Carpenter v. United States* Fallout

This case is all about one of those “technicalities” the media sometimes glosses over when reporting on a criminal prosecution. Carey Ackies lived in New York and operated a heroin and cocaine distribution business in Maine. In a classic case of working up the distribution chain, officers used cooperating witnesses (as in persons arrested who turned on their supplier, Ackies) to obtain information about Ackies’ phones. They also listened to conversations between Ackies and his customers, who were then working as informants.

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Handcuffs Didn't Fit and Neither Does Qualified Immunity

An officer stopped Ruben Sebastian for speeding. After checking the light transmission on his tinted front windows, the officer asked for consent to search the back of the car where the window tint was darker. Sebastian denied consent, noting the front windows were both down.

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Now Available

The third edition of my book, *K9 Officer's Legal Handbook*, is now available! This new edition features an expanded section on dealing with detector dogs and medical and recreational marijuana. The book offers practical and current legal guidance to administrators who may not be familiar with the peculiar application of the FLSA to canine handlers (and the financial risk of getting it wrong), expanded guidance for K9 handlers facing court challenges based on training and certification issues, and the latest information on defeating pseudo-science claims of so-called experts.

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Thursday, April 11 at 1 pm ET/10 am PT

The Prison Rape Elimination Act (PREA) sets important standards for protecting inmates and staff from exploitation, harassment and sexual abuse. Although there are currently no legal sanctions for noncompliance, all jails should strive to meet PREA standards. Join Lexipol for a primer on the most important aspects of PREA and practical strategies for addressing standards through your facility's policies, procedures and physical plan features.

Register here! (If you can't attend, you'll still receive a link to the recording.)

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Today's Tip featuring Gordon Graham

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